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Nos. 06-969 & 06-970

IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Appellant,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

SENATOR JOHN MCCAIN, ET AL.,

Appellants,

v.

WISCONSIN RIGHT TO LIFE, INC.,

Appellee.

On Appeal From
The United States District Court
For The District Of Columbia

BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Whether the prohibition on corporate disbursements for "electioneering communications" during a statutorily imposed black-out period, codified at 2 U.S.C. § 441b, is unconstitutional as applied to television advertisements that are devoted exclusively to urging constituents to contact named elected officials regarding pending governmental matters.

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Other Authorities (cont'd)

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Press Release, Office of the Press Secretary, President Signs Campaign Finance Reform Act (Mar. 27, 2002), *at* http://www.whitehouse.gov/news/releases/2002/03/20020327.html 3

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BRIEF OF UNITED STATES SENATOR MITCH McCONNELL AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether the prohibition on "electioneering communications," codified at 2 U.S.C. § 441b, is unconstitutional as applied to grass-roots lobbying. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an elected official with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Republican Leader. He also is the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate's foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *Stop Arm-Twisting "Support,"* USA TODAY, Feb. 8, 2007, at 14A; Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002, at 13A;

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17.

Senator McConnell's strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.[2] Senator McConnell's position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the Bipartisan Campaign Reform Act's application to the grass-roots lobbying efforts at issue here.

STATEMENT

1. In 2002, Congress passed, and the President signed, the Bipartisan Campaign Reform Act ("BCRA"), which amended the Federal Election Campaign Act of 1971 ("FECA") to curb corruption or the appearance of corruption in federal elections. *See McConnell*, 540 U.S. at 115 (calling BCRA the most recent federal enactment designed to "purge

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[2] *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Petitioners, Randall v. Sorrell, 126 S. Ct. 2479 (2006) (No. 04-1528); Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant, Wis. Right to Life, Inc. v. FEC, 126 S. Ct. 1016 (2006) (No. 04-1581); Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Republican Senatorial Committee, as *Amici Curiae* in Support of Respondents, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D'Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenxel and Eugene McCarthy, as *Amici Curiae* in Support of Petitioners, Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) (No. 95-489).

national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions" (internal quotation marks omitted)). When signing BCRA into law, President Bush cautioned that several of its provisions "present serious constitutional concerns." Press Release, Office of the Press Secretary, President Signs Campaign Finance Reform Act (Mar. 27, 2002), *at* http://www.whitehouse.gov/news/releases/2002/03/20020327.html [hereinafter Presidential Signing Statement]. The President expressed specific "reservations about the constitutionality of [BCRA § 203's] broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election." *Id.*

A year later, this Court upheld most of BCRA's provisions, and rejected a facial challenge to BCRA § 203's restrictions on issue advertising. *McConnell*, 540 U.S. at 207. In *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006), this Court clarified that its decision in *McConnell* did not "resolve future as-applied challenges" to BCRA § 203. *Id.* at 1018. This Court is now squarely confronted with the as-applied constitutional challenge that *McConnell* invited for another day.

2. BCRA § 203 prohibits any corporation from "mak[ing] a contribution or expenditure in connection with any election to any political office, or in connection with any primary election . . . for any political office." 2 U.S.C. § 441b(a). The terms "contribution" and "expenditure" are defined to include "electioneering communications." *Id.* § 441b(b)(2).

An "electioneering communication," in turn, is defined as any broadcast, cable, or satellite communication that (i) refers to any clearly identified federal candidate; (ii) is made within 30 days of a primary or 60 days of a general election; and (iii) is targeted to the electorate of the identified candidate. 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R.

§ 100.29(b)(2) ("[r]efers to a clearly identified candidate means that the candidate's name, nickname, photograph, or drawing appears"). Once these provisions are triggered, a corporation "may not use [its] general treasury funds to finance electioneering communications"; if it intends to run advertisements referring to particular federal officeholders during this black-out period, it must first create a distinct organization—a separate segregated fund (or PAC)—in order to speak. *McConnell*, 540 U.S. at 204; *see also* 2 U.S.C. § 441b(b)(2)(A)-(C).[3] BCRA § 203 thus extended FECA's existing restrictions on "express advocacy," which applied to corporate-funded advertisements that explicitly advocated a candidate's election or defeat, to electioneering issue advertisements, which did not expressly advocate a vote for or against a candidate. *McConnell*, 540 U.S. at 193-94.

In *McConnell*, the parties challenging BCRA's constitutionality argued that § 203's restriction on electioneering communications was substantially overbroad and thus facially unconstitutional. 540 U.S. at 204. The Court rejected this facial challenge because it believed that "the vast majority" of issue ads aired during the weeks immediately preceding an election served an electioneering purpose (*id.* at 206) and that restrictions on such ads were necessary to combat the potentially distorting impact of corporate wealth on elections. *Id.* at 205. The Court explained that the "justifications for the regulation of express advocacy apply equally to [issue] ads aired during those periods *if* the ads are intended to influence the voters' decisions *and* have that effect." *Id.* at 206 (emphases added). The Court recognized that restric-

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[3] Section 441b(b)(2)(C) provides that "the term 'contribution or expenditure' . . . shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock."

tions on issue ads that are *not* intended to serve an electioneering purpose are constitutionally suspect and are thus amenable to an as-applied challenge. *See id.* at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads" that do not serve an electioneering function).

3. During the summer of 2004, Wisconsin Right To Life, Inc. ("WRTL"), a nonprofit, 501(c) tax-exempt Wisconsin corporation, ran a series of advertisements urging Wisconsin residents to lobby United States Senators Feingold and Kohl to oppose filibusters of judicial nominees. *See* Jurisdictional Statement Appendix ("J.S.A.") at 2a-6a. The filibuster issue was then receiving significant national attention, and there was a vigorous public debate about the judicial confirmation process.

WRTL's lobbying campaign did not refer to the Senators' party affiliations, their general voting records, or their personal lives. *See* J.S.A. at 3a-6a. In fact, the ads mentioned the Senators' names only once, concluding with the suggestion that listeners "[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster." *See id.* (wording of three filibuster ads). It is undisputed that, because the ads made reference to Senator Feingold, who was then seeking re-election, they fell within the plain terms of BCRA's electioneering communications provisions for approximately a two-and-a-half-month period, beginning August 15, 2004. *See id.* at 6a-7a.[4]

4. On July 28, 2004, WRTL filed suit in the United States District Court for the District of Columbia and sought a preliminary injunction allowing it to continue running the filibuster ads with general treasury funds during the statuto-

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[4] Because Senator Feingold was a candidate in the September 14 primary and the November 2 general election, WRTL was prohibited from running the filibuster ads from August 15 to November 2, 2004.

rily imposed black-out period. *See* J.S.A. at 7a. A three-judge panel, convened pursuant to BCRA § 403(a)(1), denied WRTL's request for injunctive relief, interpreting *McConnell* as precluding all as-applied challenges to BCRA's electioneering communications provisions. *See id.* at 8a.

This Court noted probable jurisdiction and unanimously reversed, concluding that the district court had misinterpreted *McConnell*. *Wis. Right to Life*, 126 S. Ct. at 1018. The Court explained that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges," *id.*, and remanded the case with instructions that the district court consider the merits of WRTL's claims.

5. On remand, the district court granted WRTL summary judgment, holding that BCRA § 203 is unconstitutional as applied to the three anti-filibuster ads that WRTL ran in the period preceding the 2004 election. *See* J.S.A. at 1a-2a. As an initial matter, the court held that WRTL's claim with respect to the three ads is not moot because the difficulty of obtaining judicial review during the brief BCRA blackout period, and WRTL's stated intention of running similar issue ads during future periods, suffice to bring its challenge within the exception for claims "capable of repetition, yet evading review." *See id.* at 11a-15a.

On the merits, the court held that BCRA § 203 cannot be constitutionally applied to issue ads that are neither express advocacy nor its functional equivalent because the government lacks a compelling interest in foreclosing grass-roots advocacy in the period preceding an election. *See* J.S.A. at 16a. The court therefore evaluated the text and images of WRTL's ads to determine whether they evidenced an electioneering purpose or effect. *See id.* at 18a-19a. The court declined, however, to expand its inquiry beyond the "four corners" of the ads, reasoning that it would be unmanageable to conduct an as-applied challenge during the statutorily prescribed blackout period if each case required depositions and

expert testimony regarding the likely impact of an ad and its sponsor's alleged subjective intent. *See id.* at 19a-20a. The court emphasized that "delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake." *Id.* at 20a.

The district court listed several factors that it deemed relevant in identifying a constitutionally protected grass-roots lobbying ad—namely, whether the ad

> (1) describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate.

J.S.A. at 22a. Applying these factors to WRTL's ads, the court concluded that the ads did not serve an electioneering purpose because they addressed judicial filibusters—a pressing matter of public concern—and referred to Senator Feingold, then a candidate for reelection, only in the ads' "call-to-action" line, which exhorted viewers to contact the Senator to express their views on the issue. *See id.* at 23a-24a. The court therefore concluded that BCRA § 203 could not be constitutionally applied to WRTL's ads. *See id.* at 29a.

The United States filed a notice of appeal and a jurisdictional statement, and this Court agreed to hear the case, while postponing further consideration of the question of jurisdiction until the hearing on the merits.

SUMMARY OF ARGUMENT

This case presents the exceptionally important question whether BCRA § 203's restrictions on electioneering communications can be constitutionally applied to grass-roots lobbying ads that do not serve an electioneering purpose. The Court's resolution of this issue should give due regard to the free speech and petition rights embodied in the First Amendment.

In *McConnell*, the Court explicitly acknowledged the serious constitutional concerns that would be raised by the application of BCRA's electioneering communications provisions to grass-roots lobbying activity. *See* 540 U.S. at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of . . . issue ads" that do not serve an electioneering purpose); *see also* Presidential Signing Statement (expressing "reservations about the constitutionality of the broad ban on issue advertising"). Because the ability of citizens to express their views and communicate with their elected representatives without restraint is the essence of self-government and rests at the heart of the First Amendment, BCRA § 203's limitations on grass-roots lobbying are unconstitutional.

Political speech rests "[a]t the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). Grass-roots lobbying, a traditional means of influencing governmental action through citizen participation, fits squarely within the scope of core political speech and is also a manifestation of the people's constitutionally protected right to petition the government. To restrict this class of favored speech, the government must establish that the restriction is narrowly tailored to serve a compelling governmental interest.

This demanding level of scrutiny is warranted because political speech underlies every facet of the American system of government. Without robust political debate, the people

cannot govern themselves effectively. Grass-roots lobbying facilitates self-governance by encouraging citizen participation in government and the free exchange of ideas. Open discourse thus serves a consensus-building function, which ensures that the "best" ideas win out in the political marketplace.

The government has not identified a compelling interest sufficient to justify the imposition of BCRA's restrictions on grass-roots lobbying ads during the weeks immediately preceding an election, when constituents are most receptive to political ads and Congress is often at the height of its legislative activity. A generalized concern about protecting the integrity of the election process does not justify imposing restrictions upon grass-roots issue ads because such restrictions do not further the government's asserted anticorruption interest. Grass-roots issue ads are not functionally equivalent to electioneering issue ads because grass-roots issue ads do not urge a candidate's election or defeat, either in appearance or actuality. Indeed, the only link between grass-roots issue ads and elections is the fact that such ads are run during the time frame immediately preceding an election, and that they exhort citizens to contact named elected officials with respect to pending legislative or executive matters. A desire to insulate incumbents from public scrutiny is not a constitutionally adequate basis for restricting debate on issues of political import.

Nor would First Amendment interests be advanced by intrusive judicial scrutiny into the subjective political views of grass-roots lobbyists. The district court was therefore correct that an objective test—one that limits the search for an electioneering purpose and effect to the "four corners" of the ad--is least intrusive and best ensures a speedy resolution to litigation. An inquiry into the subjective intent underlying an ad would not only be unduly burdensome but would also impermissibly intrude upon the speaker's political beliefs.

This Court should consider this case against the backdrop of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Restricting grass-roots lobbying efforts would silence core political speech that is integral to the functioning of our form of government.

ARGUMENT

I. GRASS-ROOTS LOBBYING IS CORE POLITICAL SPEECH.

A. Political speech lies at the heart of the First Amendment's protections, which ensure the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Grass-roots lobbying, which includes any effort to persuade the electorate to support or oppose particular legislative or other official action, is essential to the robust political debate that the First Amendment was designed to foster. *See, e.g.*, 26 U.S.C. § 4911(d)(1) (defining "grass roots" lobbying for tax purposes). Such lobbying is a traditional and critical tool through which people disseminate ideas and make their views known to their elected officials.

This Court has long recognized the importance of "preserv[ing] an uninhibited marketplace of ideas in which truth will ultimately prevail," and preventing "monopolization of that market . . . by the Government itself." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969). Indeed, "issue-based" speech involving "advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). Debate on issues of public importance ensures that the people, rather than the government, retain primary responsibility for the policy choices made on their behalf. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("the First Amendment serves to ensure that

the individual citizen can effectively participate in and contribute to our republican system of self-government").

Constitutional protection for grass-roots lobbying promotes participatory government. Through the dissemination of views on public issues, grass-roots lobbyists help promote public debate and the development of a responsible, informed electorate. *See Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (First Amendment protection "is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern"); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (same). Informed citizens, in turn, are better able to hold their representatives accountable for unwise or unjust measures that impair the public interest. Indeed, as the Founders were aware, the "ready communication of thoughts between subjects, and its consequential promotion of union among them," render "oppressive officers . . . ashamed or intimidated into more honourable and just modes of conducting affairs." Continental Congress, Address to the Inhabitants of the Province of Quebec (Oct. 26, 1774), *in* 1 JOURNAL OF THE CONTINENTAL CONGRESS 104, 108 (1904 ed.), *quoted in Thornhill*, 310 U.S. at 102.

WRTL's grass-roots issue ads fit squarely within this constitutional tradition because they were designed to raise awareness among Wisconsin voters of the Senate's filibuster of judicial nominees and to urge constituents to contact the very people who could bring the filibuster to a close—their U.S. Senators.

The right to engage in grass-roots lobbying activity also finds specific textual support in the First Amendment right "to petition the Government for a redress of grievances," U.S. CONST. amend. I, which this Court has deemed "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (internal quotation marks omitted). The right to peti-

tion—coupled with the freedoms of association and assembly also protected by the First Amendment—renders the government accountable to the people by providing citizens with the ability to make their views known to their elected officials. Indeed, the "very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

The freedom to petition is distinct from the right of the people to choose their representatives through periodic elections. *See* Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 162 (1986) (noting "the citizenry's two constitutional means of approaching the government: periodic election and continual instruction through petitioning"). While the right to vote ensures that the people can replace ineffectual leaders with others who would better represent them, elections are necessarily episodic. Popular participation in government, however, does not only occur during an election cycle, because the Founders provided the people with the right to petition, which is an independent and ever-present check on the arbitrary exercise of power. It "not only assure[s] popular control of government, but also attach[es] to each citizen responsibility for the nation's laws." *Id.*

B. Because robust political speech is essential to republican government, this Court has applied the most exacting judicial scrutiny to attempts to burden such expression. *See FEC v. Mass. Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 256 (1986) ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest."). This scrutiny is applied whenever a regulation's "practical effect . . . is to make engaging in protected speech a severely demanding task," even if the law permits speech by those who comply with the government's directives. *Id.* If the government identifies a compelling interest, the regula-

tion must still be "closely drawn to avoid unnecessary abridgement" of speech. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (internal quotation marks omitted). The severe constraints that BCRA § 203 imposes on grass-roots lobbying in the weeks preceding a federal election cannot survive this stringent scrutiny.

To be effective, grass-roots lobbyists must be able to communicate their message during the times best suited to achieving their political objectives. Indeed, "[u]rgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed." *McIntyre*, 514 U.S. at 347; *see also Mills v. Alabama*, 384 U.S. 214, 219 (1966) (holding unconstitutional a state law that prohibited election-day speech because the law "silence[d] the press at a time when it can be most effective"). BCRA § 203 prohibits airing grass-roots lobbying ads that fall within its definition of "electioneering communications" at the time when the public will be most receptive to political ads and legislators will be most likely to pay heed to their constituents' guidance—the weeks leading up to a federal election. *See, e.g., McConnell v. FEC*, 251 F. Supp. 2d 176, 793 n.98 (D.D.C. 2003) (Leon, J.) (listing "important, and controversial, pieces of legislation" before Congress in the 60 days prior to the 2002 midterm elections). Indeed, by targeting messages concerning incumbent officials who are facing reelection, BCRA § 203 prevents grass-roots lobbying directed at those politicians most likely to be sensitive to constituent concerns. The First Amendment, however, prohibits the government from regulating issue-based speech merely because it may prove influential. *See Bellotti*, 435 U.S. at 791-92. The government cannot insulate itself from criticism on public issues at the very moment when that criticism will be most keenly felt.

The realities of the presidential primary season and multi-state media markets exacerbate the problems that advocacy groups face in airing grass-roots lobbying ads prior to

an election. Because each State holds a presidential primary or caucus for both major parties, followed by the general election in November, the total BCRA blackout period for presidential nominees could exceed 120 days in every State. *See* Bradley A. Smith & Jason R. Owen, *Boundary Based Restrictions in Unbounded Broadcast Media Markets: McConnell v. FEC's Underinclusive Overbreadth Analysis*, 18 STAN. L. & POL'Y REV. __ (forthcoming 2007). Moreover, because television networks in large metropolitan areas often serve more than one State, such stations may need to observe longer blackout periods due to staggered state primaries. *See id.* Although these restrictions are most severe for national candidates, they are by no means so limited (as the facts of this case illustrate). Indeed, BCRA § 203 restricts, for example, the ability of an advocacy group to run an issue ad in the D.C. media market that names the sponsors of a bill or committee members conducting a hearing, if the network also serves a State where the named incumbents are facing reelection. *See id.*

The alternatives offered by appellants do not provide adequate channels for effective grass-roots lobbying. For example, it will often not suffice for an advocacy group to run an ad omitting the name of a candidate. This is particularly true when the purpose of an ad is to spur the electorate to action by convincing constituents to contact their elected representatives about a specific political issue. *See McConnell*, 251 F. Supp. 2d at 794 (Leon, J.) (citing expert testimony stating that "[t]he express or implied urging of viewers or listeners to contact the policymaker regarding [an] issue is . . . especially effective by showing them how they can personally impact the issue debate in question" (alterations in original)). The name of a candidate may also be indispensable when a piece of legislation is closely associated with a particular person (*e.g.*, "McCain-Feingold") or when mentioning a candidate helps the viewer remember the message of the ad. *See id.* For example, WRTL's ads dealt with fili-

busters and judicial confirmations, which some members of the public may not know are issues within the exclusive province of the Senate. By asking the viewer to contact Senators Feingold and Kohl, the ads connect familiar names with the issue and with the legislative body responsible for resolving it. An ad omitting those names would have left a much more fleeting impression on viewers.

Nor does it suffice to save BCRA § 203 from unconstitutionality that grass-roots lobbyists may run an issue ad during the statutorily prescribed "blackout" period by using PAC money. As this Court has recognized, PAC regulations "impose administrative costs that many small entities may be unable to bear," creating a disincentive for those organizations to engage in political speech at all. *MCFL*, 479 U.S. at 254. Indeed, the FEC's "Campaign Guide for Corporations and Labor Unions" is more than 115 pages long (http://www.fec.gov/pdf/colagui.pdf), and the federal regulations governing PACs are equally extensive. *See* 11 C.F.R. pt. 102. In addition, more than thirty years of precedent governing PACs are embodied in FEC advisory opinions and enforcement actions. Confronted with the specter of substantial administrative fines for violations of these complex regulatory requirements, advocacy groups must generally retain not only an election lawyer but also an accountant to ensure regulatory compliance. These are costs that many groups simply cannot afford, especially because they must also invest in expensive computer equipment and software to comply with the FEC's electronic filing requirements for PAC disclosures.

Moreover, "the reporting and disclosure requirements [for PAC donors] will deter some individuals who otherwise might contribute," *MCFL*, 479 U.S. at 254 n.7 (internal quotation marks omitted), and it is therefore more difficult for corporations and nonprofit organizations to raise PAC money than general treasury funds WRTL understandably desires to use its scarce PAC resources to fund "express advocacy,"

or campaign-related speech. WRTL and similarly situated groups should not have to choose between exercising their First Amendment right to engage in electioneering or their First Amendment right to pursue grass-roots lobbying campaigns in the critical weeks before a federal election.[5]

Furthermore, WRTL's PAC is "a separate legal entity . . . that engages in independent political advocacy." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196 (1981). Use of a PAC would prevent WRTL from running an issue ad in its own name. In addition, since organizations create PACs to solicit money for campaign-related speech, and the FEC requires a disclaimer on each ad funded by a PAC, BCRA § 203 compels grass-roots lobbyists to create ads carrying the PAC label for speech that is unrelated to any election. Ironically, in such cases, the law requires an issue-advocacy group to create an ad that, while intended only to address an issue of public concern, carries on its face a label suggesting an electioneering purpose.

Perhaps recognizing the weakness of its arguments on the merits, the United States makes the unprecedented claim that WRTL bears the burden of proof in an as-applied constitutional challenge to BCRA § 203. U.S. Br. 32. On the contrary, it is well-established that, "[e]specially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, the State may prevail only upon showing a subordinating interest which is compelling." *Bellotti*, 435 U.S. at 786 (internal quotation marks and footnote omitted). The "burden is on the *Gov-*

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[5] The importance of preserving the right to engage in grass-roots lobbying unencumbered by governmental burdens is reflected in the Senate's recent vote to remove a provision from the Lobbying Transparency and Accountability Act of 2007 that would have required the public disclosure of paid efforts to stimulate grass-roots lobbying. S. 1, 110th Cong. § 220. The amended bill passed the Senate by a vote of 96-2.

ernment to show the existence of such an interest." *Id.* (emphasis added; internal quotation marks omitted). For example, in *MCFL*, a nonprofit corporation brought an as-applied challenge to the provision of FECA requiring corporations to use a PAC to fund independent expenditures for express advocacy. *See* 479 U.S. at 241. In considering the claim, the Court carefully scrutinized each of the rationales that the United States offered in defense of the PAC requirement, and concluded that none of them justified the onerous burdens imposed on MCFL's freedom of speech. *See id.* at 256-63. This analysis would have been entirely beside the point if, as the government now argues, MCFL had borne the burden of establishing its entitlement to an exemption from a facially valid law. The government's test turns the traditional burden of proof in First Amendment cases on its head.[6]

C. The government cannot demonstrate a compelling interest that adequately justifies the significant burdens that BCRA § 203 imposes on grass-roots lobbying.

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[6] The United States also asks this Court to adopt a novel standard for determining whether a case falls under the "capable of repetition, yet evading review" exception to mootness: namely, that WRTL must show that it intends to run ads in the future that share "*the particular characteristics* that the district court found legally dispositive." U.S. Br. 25 (emphasis added). This standard is plainly incorrect. The practical effect of requiring grass-roots lobbyists to demonstrate that they anticipate reoccurrence of the precise factual circumstances before the court would be to prevent the adjudication of *any* as-applied challenge to BCRA § 203 and to insulate that provision from constitutional scrutiny. J.S.A. at 14a. Under this Court's precedent, WRTL need only demonstrate that there is a "reasonable expectation" that it will be subject to the "same action" again. *Belotti*, 435 U.S. at 774 (internal quotation marks omitted). As the intervenor-appellants concede, WRTL easily satisfies this burden, "particularly in light of more recent attempts by WRTL to finance electioneering communications with its general treasury funds." McCain Br. 13 n.8.

The government does not have the same compelling interest in regulating grass-roots lobbying as it does in regulating true electioneering. Congress enacted the "electioneering communications" provisions in BCRA to protect the integrity of electoral politics against "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). There is no comparable concern that corporations or nonprofits will use grass-roots lobbying—which is designed to foster discourse between the people and their elected representatives, rather than to further a campaign for political office—to exercise undue influence over elections. *See McConnell*, 540 U.S. at 206 n.88 ("we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads"); *Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present" in an effort to influence the outcome of a state referendum).

Grass-roots lobbying ads that merely advise voters to contact their elected representatives to express their views on a particular issue contribute neither to actual corruption nor to its appearance. As the district court explained, the "common denominator between express advocacy and its functional equivalent . . . is the link between the words and images used in the ad and the fitness, or lack thereof, of the candidate for public office." J.S.A. at 27a. The government has no legitimate interest in regulating speech under BCRA § 203 if that speech is directed at an issue of public concern and is silent on the suitability of the named candidate for office.

Indeed, the regulation of genuine issue advocacy actually impairs the government's interest in ensuring fair and equal opportunity for citizens to participate in the electoral process. While the use of corporate money in elections may create perceived imbalances of political power, the free and

open exchange of ideas on issues of political importance is a principal guarantor of equality in participatory government. *See McIntyre*, 514 U.S. at 348 n.11 ("the best test of truth is the power of the thought to get itself accepted in the competition of the market" (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))). The government is therefore wrong to suggest that regulation of issue advocacy is necessary to prevent corruption in elections; "healthy campaigns and a healthy democracy are not in conflict with the First Amendment, but contingent upon it." Mitch McConnell, *Healthy Campaigns, Democracy Are Compatible*, THE HILL, July 24, 2002, at 30.

In *McConnell*, this Court recognized that there might be examples of classes of speech that Congress could not constitutionally regulate under BCRA § 203 and that the "justifications for the regulation of express advocacy apply equally" to issue ads only "*if* the ads are intended to influence the voters' decisions *and* have that effect." 540 U.S. at 206 & n.88 (emphases added). The Court should now make clear that BCRA § 203 is unconstitutional as applied to grass-roots lobbying because the government lacks a compelling interest in restricting political speech that does not have the purpose or effect of influencing an election.

II. IN EVALUATING WHETHER A GRASS-ROOTS LOBBYING COMMUNICATION IS CONSTITUTIONALLY PROTECTED, COURTS SHOULD CONSIDER ONLY THE "FOUR CORNERS" OF THE AD.

Appellants urge this Court to endorse an open-ended, subjective inquiry that would empower judges to scrutinize the full panoply of a speaker's political views and activities to determine whether a facially authentic issue ad "truly" constitutes grass-roots lobbying. The substantial litigating burdens associated with appellants' proposed test would have a significant chilling effect on the grass-roots advocacy of

groups unable to divert their finite resources to fund a lengthy court battle with the government. Appellants' test also disregards the fact that advocacy groups like WRTL are often interested in influencing both legislative activities and the outcome of elections, and that they have a wide variety of constitutionally protected tools at their disposal to further their various political objectives. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."). To that end, advocacy groups organize community events to educate the public about important issues, propose and draft new legislation, establish and utilize PACs for electioneering purposes, and run issue-specific grass-roots lobbying ads to support or oppose particular legislative proposals. The test advocated by appellants would impermissibly burden the grass-roots lobbying rights of those organizations that also engage in express electioneering activities.

The district court therefore properly confined its inquiry to the text and images of WRTL's ads. This objective standard for identifying grass-roots lobbying safeguards the government's interest in preventing corruption and preserving the integrity of the electoral process. An invasive, subjective inquiry, on the other hand, would chill constitutionally protected speech and unnecessarily burden the judicial process.

A. The subjective standard for identifying grass-roots lobbying urged by appellants would require intrusive inquisitions into the thoughts and beliefs of the officers and directors of grass-roots lobbying organizations to determine the "true" motivation behind their ads. The prospect of having to disclose one's political affiliations and electoral preferences by deposition or testimony in the course of a lawsuit is almost certain to deter "the uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment." *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (internal quotation marks omitted). This will be

particularly true for small, comparatively unsophisticated groups that engage in grass-roots lobbying. When confronted with burdensome regulation and the possibility of intrusive litigation, "it would not be surprising if at least some [smaller] groups decided that the contemplated political activity was simply not worth it." *MCFL*, 479 U.S. at 255. The members of political associations should not have to endure such invasive judicial inquiries in order to exercise their fundamental First Amendment rights. *See* J.S.A. at 20a ("delving into a speaker's subjective intent is both dangerous and undesirable when First Amendment freedoms are at stake").

The district court also noted the significant practical consequences of adopting a subjective test. An inquiry into the intentions underlying an ad would entail lengthy discovery and trial testimony, and would make it virtually impossible for issue advocates to mount a successful as-applied challenge within the limited time frame of the BCRA blackout period. *See* J.S.A. at 19a. Indeed, a subjective test would make it very difficult for political associations to structure their future conduct with any degree of certainty, as the government could conceivably introduce a written or oral statement of any member of the organization as proof of hidden electioneering intent. *See Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (noting that a subjective intent test "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning" (internal quotation marks omitted)). To ensure compliance with BCRA § 203, advocacy organizations would need to consult closely with lawyers in developing their grass-roots lobbying campaigns—a cost that many groups would be unable to absorb and that would compel such groups to forgo grass-roots lobbying altogether. The subjective approach advocated by appellants would thus inevitably result in the suppression of a significant amount of constitutionally protected speech.

Moreover, this Court has made clear that First Amendment protection cannot depend on the identity of the speaker. *See Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ."). Indeed, the First Amendment forbids regulation of speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Despite this well-established prohibition on "viewpoint discrimination," appellants ask this Court to determine whether WRTL's ads constitute grass-roots lobbying by parsing its press releases, e-alerts, voter guides, and the full content of its former website, "befair.org," for evidence that WRTL supports or opposes the candidate named in the ad. *See, e.g.*, McCain Br. 25, 27, 42.[7] These materials and other public pronouncements made by nonprofit groups like WRTL will often reveal the electoral preferences of the speaker; they do not, however, transform grass-roots lobbying into the functional equivalent of express advocacy.

Participants in the political marketplace may use a variety of methods to achieve their policy aims, and each method is suited to accomplish a particular result. It is undisputed

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[7] Appellants place considerable weight on the content of WRTL's website, "befair.org," and the exhortation in the ads to visit the site for more information. Directing viewers to the website makes perfect sense: It will almost always be easier for viewers to remember the name of a website than a telephone number or address mentioned briefly at the end of an ad. While the full content of the site contains examples of campaign-related speech (as well as contact information for the Senators), this will be true of any advocacy group that engages in both electioneering and lobbying activities, and that uses a website as a clearinghouse for its various activities. Appellants' blunderbuss approach to the analysis of an ad threatens to strip issue-based speech of constitutional protection whenever a political association that runs issue ads publicizes its electioneering activities on the same website that promotes its issue advocacy campaign.

that one of WRTL's top legislative priorities in 2004 was to end the filibuster of President Bush's judicial nominees. WRTL chose to conduct a grass-roots lobbying campaign to increase citizen awareness of the issue and encourage constituents to make their voices heard by contacting their elected representatives. Regardless of whether WRTL also engaged in electioneering activity, BCRA § 203 cannot be constitutionally applied to WRTL's grass-roots lobbying. *See, e.g., E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (holding that the constitutional right to petition precluded application of the Sherman Act "to the activities of the railroads . . . insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws"). If this Court adopted appellants' test, it would be difficult, if not impossible, for a nonprofit entity that engaged in an array of political activities, including electioneering, to avoid the suspicion that its grass-roots lobbying campaigns were a veiled attempt to influence an election.[8]

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[8] The "four corners" approach adopted by the district court does not, as the United States suggests, reintroduce *Buckley*'s "magic words" test. *See* U.S. Br. 38. Rather, it instructs courts to look to the text and images of an ad to determine if the ad, when considered as a whole by a reasonable viewer, "promotes, attacks, supports, or opposes the named candidate," or otherwise indicates that it is the functional equivalent of express advocacy. *See* J.S.A. at 22a. This approach is hardly novel. Indeed, courts routinely exclude extrinsic evidence in statutory or contractual interpretation because the text of the document itself is the most reliable evidence of the author's meaning. *See, e.g., W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) ("[W]e do not permit [statutory text] to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 284 (1990) ("At common law and by statute in most States, the parol evidence rule prevents the variations of the terms of a written contract by oral testimony.").

B. The district court properly applied its objective inquiry to WRTL's ads. Those ads refer on their face to judicial filibusters—a pressing issue of public concern—and evidence no electioneering intent. The ads mention the Senators from Wisconsin only in the "call-to-action" line, do not praise or criticize them politically or personally, and do not refer to their voting records on the filibuster issue. *See* J.S.A. at 3a-6a. Indeed, WRTL's inclusion of the names of both Wisconsin Senators—one of whom, Senator Kohl, was not running for reelection in 2004—strongly suggests that the purpose of the ads was to influence legislative behavior, not electoral outcomes.

Because no reasonable viewer could interpret these facially neutral ads as an attempt to influence an election, Congress lacks a constitutionally sufficient basis to suppress that political speech.[9]

* * *

A grass-roots lobbying campaign that urges the electorate to contact its elected representatives to effect policy change does not raise the corruption concerns that Congress contemplated when it enacted BCRA's "electioneering communication" provisions. On the contrary, grass-roots lobbying fosters broad-based participation in public affairs and en-

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[9] Appellants urge this Court to reject WRTL's proposed test for identifying constitutionally protected grass-roots lobbying ads and to adopt instead a broader, subjective standard. *See* U.S. Br. 29-32. The need for any such test, however, is a direct consequence of this Court's decision in *McConnell* upholding BCRA § 203's facial constitutionality. *See* 540 U.S. at 206. The government should not be permitted to silence core political speech merely because, under the legal framework created by Congress and upheld in part by this Court, the lower courts may have to confront some difficult borderline cases. Indeed, the Court could reduce the number of difficult cases by holding that, in the event of doubt, First Amendment principles should prevail and constitutionally protected speech should be allowed to proceed.

hances government accountability. Indeed, the United States concedes that "some corporations are engaged in legitimate issue advocacy designed to urge changes in the law rather than to affect federal elections," and that BCRA "may occasionally capture advertisements that demonstrably lack any electoral purpose or effect." U.S. Br. 49. Without a compelling state interest—which is demonstrably lacking here—Congress cannot regulate such political speech because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

Ultimately, appellants seem to believe that it is more expedient to prohibit all speech that falls within BCRA § 203's broad definition of "electioneering communications," rather than to permit case-by-case adjudication of the purpose and effect of particular ads. However, "the desire for a bright-line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in original). Indeed, the notion that the First Amendment ceases to operate when it "become[s] inconvenient or when expediency dictates otherwise is a very dangerous doctrine [that] would . . . undermine the basis of our government." *Reid v. Covert*, 354 U.S. 1, 14 (1957). Legislation, however well-intentioned, may not intrude on the basic liberties that make republican government possible.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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